Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 24 NOVEMBER 21, 1990 No. 47

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 90–84)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback authorizations issued September 18, 1989, to July 23, 1990, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was issued.

Date: October 30, 1990.

File: DRA-1-09
222639

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: Aectra Refining & Marketing, Inc.
Articles: Various intermediate and finished product formulations (blended)
Merchandise: Unleaded gasoline; leaded gasoline; aviation gasoline; C-9 aromatics
Factories: Agents operating under T.D. 81-181 and T.D.'s 55207(1) and 55027(2)
Statement signed: April 19, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Houston, June 18, 1990
Revokes: T.D. 89-61-B

(B) Company: Aectra Refining and Marketing, Inc.
Articles: Gasoline, various grades including aviation gasolines
Merchandise: Tetraethyl lead (TEL-CB)

Factories: Deer Park, Galena Park, Pasadena, Houston, Port Neches, TX; Carterest, NJ (agents operating under T.D. 81-181 and T.D. 55207(1))
Statement signed: December 28, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Houston, July 3, 1990

(C) Company: BASF Corp.
Articles: 1,6-hexanediol; pentanediol (Diol mixture)
Merchandise: Crude hexanediol
Factory: Freeport, TX
Statement signed: October 10, 1989
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RC of Customs: New York, July 2, 1990
Revokes: T.D. 89-81-D

(D) Company: Cal-Compack Foods, a division of Beatrice/Hunt-Wesson, Inc.
Articles: Chili powder; chili pepper, red peppers; paprika; oleoresin paprika
Merchandise: Dehydrated chili peppers, red peppers, and paprika
Statement signed: July 28, 1989
Basis of claim: Appearing in as to chili pepper, chili powder, red pepper and paprika; used in as to oleoresin paprika
Rate issued by RC of Customs in accordance with § 191.25(b)(2): Los Angeles, September 18, 1989
Revokes: T.D. 76-344-C to cover a change in name from Cal-Compack Foods, Inc., a division of Beatrice Foods Co.

(E) Company: Bristol-Myers Co.
Articles: Sodium phenoxy acetate
Merchandise: Phenoxyacetic acid
Factory: East Syracuse, NY
Statement signed: May 5, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, July 3, 1990

(F) Company: Charter Power Systems, Inc.
Articles: Industrial lead-acid batteries; lead battery plates
Merchandise: Antimonial-lead alloys; calcium-lead alloys; pig lead; calcium-tin-lead; calcium-aluminum-lead alloy; tin-lead alloys; calcium-tin-aluminum-lead alloy
Factories: Attica, IN; Conyers, GA; Huguenot, NY; Leola, PA
Statement signed: September 21, 1989
Basis of claim: Used in, less valuable waste
Rate forwarded to RCs of Customs: New York & Boston, May 31, 1990

(G) Company: Colfax, Inc.
Articles: Vegetable shortening
Merchandise: Rapeseed oil
Factories: Pawtucket, RI
Statement signed: February 12, 1986
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RC of Customs: New York, May 29, 1990

(H) Company: GenCorp Polymer Products
Articles: Wallcoverings
Merchandise: Polyester/cotton cloth/(scrim); titanium dioxide
Factory: Columbus, MS
Statement signed: October 11, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, July 23, 1990

(I) Company: Ethyl Petroleum Additives, Inc.
Articles: Petroleum additive packages
Merchandise: HITEC® 644
Factory: Sauget, IL
Statement signed: November 13, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New Orleans, June 22, 1990

(J) Company: Glen Raven Mills, Inc.
Articles: Rayon yarn
Merchandise: Rayon staple fiber
Factories: Kings Mountain, Kinston, Rockingham & Glen Raven, NC
Statement signed: June 30, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, July 2, 1990
Revokes: T.D. 86-127-D

(K) Company: Glen Raven Mills, Inc.
Articles: Acrylic fabrics and yarn
Merchandise: Acrylic staple fiber
Factories: Anderson, SC; Kinston, Rockingham & Glen Raven, NC
Statement signed: June 30, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: July 2, 1990
Revokes: T.D. 79-155-H

(L) Company: Gold Mills, Inc.
Articles: Greige and dyed nylon fabric; greige and dyed polyester fabric
Merchandise: Nylon and polyester yarn
Factory: Pine Grove, PA

Statement signed: May 24, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, July 2, 1990

(M) Company: Henningsen Foods, Inc.
Articles: Dried egg yolk; dried egg white
Merchandise: Whole chicken eggs in the shell
Factories: David City & RAbenna, NE
Statement signed: June 22, 1990
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative value at the time of separation
Rate forwarded to RC of Customs: New York, July 13, 1990

(N) Company: Hoechst Celanese Corp.
Articles: Polyester polymer chip, staple fiber, and filament yarn
Merchandise: Purified terephthalic acid
Factories: Salisbury, NC; Spartanburg, SC
Statement signed: June 18, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, May 21, 1990

(O) Company: Keuffel & Esser Co.
Articles: Finished film
Merchandise: Melinex polyester film
Factories: Millerton, NY; Rockaway, NJ; Gardena, CA; Lakeville, CT
Statement signed: April 10, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, July 2, 1990

(P) Company: Langston Companies, Inc.
Articles: Cotton bags; polypropylene bags
Merchandise: Woven polypropylene fabric; woven cotton fabric
Factories: Memphis, TN; Crowley, LA
Statement signed: February 23, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New Orleans, May 29, 1990

(Q) Company: Milliken & Co.
Articles: Nylon yarn
Merchandise: Textured nylon yarn
Factory: Marietta, SC
Statement signed: April 2, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, July 2, 1990

(R) Company: Nashua Photo Products of West Virginia, Inc.
Articles: Photographic paper slit to size
Merchandise: Color print photographics (glossy and luster finish)
Factory: Parkersburg, WV
Statement signed: August 4, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, May 31, 1990

(S) Company: The NutraSweet Co.
Articles: NutraSweet™ granular brand aspartame
Merchandise: NutraSweet brand aspartame
Factories: University Park, IL; Augusta, GA
Statement signed: March 19, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: Chicago, April 30, 1990

(T) Company: PMC Specialties Group, PMC Inc.
Articles: Dyphene 8318
Merchandise: Diisobutylene
Factory: Fords, NJ
Statement signed: September 7, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, April 30, 1990

(U) Company: Rayovac Corp.
Articles: Types A and J electrolytic manganese dioxide
Merchandise: Crude electrolytic manganese dioxide
Factory: Covington, TN
Statement signed: June 22, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New Orleans, July 17, 1990
Revokes: T.D. 82-225-I (ESB Materials Co.)

(V) Company: Reflexite Corp.
Articles: Retroreflective vinyl sheet, tape, and other products made in a similar manner
Merchandise: Double polished polyvinylchloride film
Factories: New Britain, CT: Rochester, NY
Statement signed: December 13, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, April 30, 1990

(W) Company: Salga, Inc.
Articles: Automotive parts
Merchandise: Polypropylene resin
Factory: Fremont, IN
Statement signed: October 18, 1989

Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, July 5, 1990

(X) Company: Union Camp Corp.
Articles: Dimethyl sebacate
Merchandise: Sebacic acid
Factory: Dover, OH
Statement signed: March 19, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, May 2, 1990

(Y) Company: Warner-Lambert Co.
Articles: Gelatin Capsules
Merchandise: Gelatin
Factory: Greenwood, SC
Statement signed: January 25, 1990
Basis of claim: Used in, less valuable waste
Rate forwarded to RC of Customs: New York, April 30, 1990

(Z) Company: Zircar Products Inc.
Articles: Fibrous ceramic thermal insulation
Merchandise: Saffil alumina bulk fiber HAB; yttrium oxide; ZR basic carbonate (ZBC); ash 1600 paper; dispersal alumina
Factory: Florida, NY
Statement signed: June 26, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, July 2, 1990

(T.D. 90–85)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List for October 1990

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart 5).

Holiday: October 8, 1990.

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for October 1990 (continued):

Greece drachma:

October 1, 1990	$0.006479
October 2, 1990	.006443
October 3, 1990	.006481
October 4, 1990	.006527
October 5, 1990	.006491
October 9, 1990	.006566
October 10, 1990	.006547
October 11, 1990	.006515
October 12, 1990	.006553
October 15, 1990	.006536
October 16, 1990	.006517
October 17, 1990	.006577
October 18, 1990	.006557
October 19, 1990	.006609
October 22, 1990	.006672
October 23, 1990	.006494
October 24, 1990	.006542
October 25, 1990	.006568
October 26, 1990	.006527
October 29, 1990	.006553
October 30, 1990	.006475
October 31, 1990	.006508

South Korea won:

October 1, 1990	$0.001397
October 2, 1990	N/A
October 3, 1990	N/A
October 4, 1990	N/A
October 5, 1990	.001397
October 9, 1990	N/A
October 10, 1990	.001395
October 11, 1990	.001395
October 12, 1990	.001394
October 15, 1990	.001393
October 16, 1990	.001391
October 17, 1990	.001392
October 18, 1990	.001394
October 19, 1990	.001392
October 22, 1990	.001391
October 23, 1990	.001391
October 24, 1990	.001389
October 25, 1990	.001390
October 26, 1990	.001392
October 29, 1990	.001394
October 30, 1990	.001395
October 31, 1990	.001395

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for October 1990 (continued):

Taiwan N.T. dollar:

October 1, 1990	$0.036641
October 2, 1990	.036643
October 3, 1990	N/A
October 4, 1990	.036655
October 5, 1990	.036667
October 9, 1990	.036654
October 10, 1990	N/A
October 11, 1990	.036637
October 12, 1990	.036630
October 15, 1990	.036642
October 16, 1990	.036637
October 17, 1990	.036635
October 18, 1990	.036625
October 19, 1990	.036643
October 22, 1990	.036657
October 23, 1990	.036643
October 24, 1990	.036637
October 25, 1990	N/A
October 26, 1990	.036650
October 29, 1990	.036674
October 30, 1990	.036670
October 31, 1990	N/A

(LIQ-03-01 S:NISD CIE)

Dated: November 01, 1990

FRANK CANTONE,
Acting Chief,
Customs Information Exchange.

(T.D. 90–86)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR OCTOBER 1990

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 90–79 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: October 8, 1990.

FOREIGN CURRENCIES—Variances from quarterly rate for October 1990 (continued):

Australia dollar:

October 15, 1990	$0.007888
October 16, 1990	.007870
October 17, 1990	.007775
October 18, 1990	.007690
October 19, 1990	.007820
October 22, 1990	.007820
October 23, 1990	.007780
October 24, 1990	.007804
October 25, 1990	.007833
October 26, 1990	.007812
October 29, 1990	.007835
October 30, 1990	.007821
October 31, 1990	.007848

Japan yen:

October 10, 1990	$0.007694
October 11, 1990	.007695
October 12, 1990	.007773
October 15, 1990	.007803
October 16, 1990	.007859
October 17, 1990	.007983
October 18, 1990	.007997
October 19, 1990	.007952
October 22, 1990	.007933
October 23, 1990	.007843
October 24, 1990	.007809
October 25, 1990	.007855
October 26, 1990	.007813
October 29, 1990	.007788
October 30, 1990	.007746
October 31, 1990	.007695

Sri Lanka rupee:

October 3, 1990	N/A
October 16, 1990	N/A
October 17, 1990	N/A
October 23, 1990	N/A

Thailand baht:

October 23, 1990	N/A

(LIQ-03-01 S:NISD CIE)
Dated: November 1, 1990

FRANK CANTONE,
Acting Chief,
Customs Information Exchange.

19 CFR Part 141

(T.D. 90–87)

[RIN 1515-AA96]

BLANKET RELEASE ORDERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to permit the use of blanket release orders by carriers in appropriate circumstances. A 1987 amendment to the regulations which eliminated several Customs forms also inadvertently eliminated all references to blanket release orders. It had not been the intention that the orders be eliminated. In order to clarify the status of these orders, this amendment of the regulations will expressly permit use of blanket release orders.

EFFECTIVE DATE: December 10, 1990.

FOR FURTHER INFORMATION CONTACT: John Preifer, Office of Cargo Enforcement, U.S. Customs Service (202) 566-5354.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In 1987, as part of an ongoing effort to streamline its operations, the Customs Service issued T.D. 87-75 which eliminated Customs forms that were determined to require the submission of information already provided to Customs by other means. Among the forms which were eliminated was CF 7529, entitled "Carrier's Certificate and Release Order". It had been determined that this form was unduly burdensome because the information sought on that form could be supplied in another manner using existing trade documentation as prescribed in 19 CFR 141.11(a).

Unfortunately, blanket release orders as prescribed in 19 CFR 141.11(a)(5) and 141.111(c) specifically required the filing of a CF 7529. When T.D. 87–75 was issued, this fact was overlooked. It had not been Customs intent to disallow the use of blanket release orders in appropriate situations. A blanket release order is a right-to-make-entry document for formal or informal entry procedures. It can be effective for the duration specified in the document.

Customs is now amending the regulations to specifically permit the use of blanket release orders by carriers. The regulations permit appropriately modified bills of lading or air waybills to be used as blanket release orders.

A notice of proposed rulemaking was published in the Federal Register on April 3, 1990 (55 FR 12385). No comments were received in response to the proposal. Accordingly, this final rule is being issued as proposed.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 141

Customs duties and inspection; Imports

AMENDMENTS TO THE REGULATIONS

Part 141, Customs Regulations (19 CFR Part 141) is amended as set forth below:

PART 141 – ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

Subpart B also issued under 19 U.S.C. 1483;

* * * * * * *

2. Section 141.11 is amended by removing the designation "Reserved" in paragraph (a)(5), and adding a new paragraph (a)(5) to read as follows:

§ 141.11 Evidence of right to make entry for importations by common carrier.

(a) * * *

(5) A blanket carrier's release order on an appropriately modified bill of lading or air waybill covering any or all shipments which will arrive within the district on the carrier's conveyance during the period specified in the release order.

* * * * * * *

3. Section 141.111 is amended by adding a new paragraph (c) to read as follows:

§ 141.111 Carrier's release order.

* * * * * * *

(c) *Blanket release order.* Merchandise may be released to the person named in the bill of lading or air waybill in the absence of a specific release order from the carrier, if the carrier concerned has filed a blanket order authorizing release to the owner or consignee in such cases. A carrier's certificate in the form shown in § 141.11(a)(4), may be modified and executed to make it a blanket release order for the shipments covered by a blanket carrier's release order under § 141.11(a)(5).

* * * * * * *

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: October 24, 1990.
Peter K. Nunez,
Assistant Secretary of the Treasury

[Published in the Federal Register, November 9, 1990 (55 FR 47051)]

(T.D. 90–88)

REVOCATION BY ACTION OF LAW OF THE CUSTOMS BROKER LICENSE FOR KAMIGUMI U.S.A. INC.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that, pursuant to section 641(c)(5), Tariff Act of 1930, as amended (19 U.S.C. 1641(c)(5)), and Part 111.45 of the Customs Regulations, as amended (19 CFR 111.45), the license for Kamigumi U.S.A., Inc., (license no. 11443) to conduct Customs business has been revoked by operation of law for failure to have at least one officer of the corporation who is validly licensed for a continuous period of 120 days. Such revocation was effective on October 13, 1990.

Dated: November 6, 1990.

VICTOR G. WEEREN,
Director,
Office of Trade Operations.

[Published in the Federal Register, November 9, 1990 (55 FR 47163)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Gregory W. Carman
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Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90–112)

EASTALCO ALUMINUM CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 83-01-00092, 83-01-00093, 83-01-00094, 83-01-00096, and 83-01-00098

Suspension Calendar 83-01-00095

F.W. MYERS & CO., INC., A/C EASTALCO ALUMINUM CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-04-00588

Suspension Calendar 83-01-00095

INTALCO ALUMINUM CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 83-05-00696, 83-05-00697, 83-05-00698, 83-05-00699, 83-06-00792, 85-11-01644, 85-11-01645, and 88-10-00814

Suspension Calendar, 83-01-00095

[Defendant's motion for injunction against voluntary dismissal and removal of this action from the Suspension Calendar and for insertion of a counterclaim or remand to Customs denied in part, granted in part.]

(Decided October 26, 1990)

Neville Peterson & Williams, (*John M. Peterson*, *Peter J. Allen*), for the plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Bruce N. Stratvert*), Civil Division, United States Department of Justice, for the defendant.

MEMORANDUM AND ORDER

RESTANI, *Judge*: These actions, in which issue has not yet been joined, are pending on the Court of International Trade's (CIT) suspension calendar. Defendant moves this court for an order: (a) removing these actions from the suspension calendar, (b) granting defendant leave to file a counterclaim against plaintiff in each action, (c) precluding plaintiff's unilateral dismissal of these actions prior to the filing of such counterclaim and (d) granting such other and further relief as the court deems just and proper under the circumstances.

Alternatively, defendant moves for an order: (a) removing these actions from the suspension calendar, (b) remanding these actions to the

United States Customs Service (Customs) for reconsideration of the appropriate classification and rate amount of duties chargeable with respect to the imported merchandise which is the subject of these actions absent further order of the court. Plaintiff opposes these requests on the basis that they are an unwarranted intrusion on its right under Rule 41(a) to dismiss an action prior to the filing of an answer, and on the basis that any counterclaim was compulsory in the test case.

FACTS

On January 14, 1983, test case plaintiff Eastalco filed several summonses in this court pursuant to 28 U.S.C. § 1581(a) (1982), contesting the classification by Customs of certain carbon refractory bricks used in the manufacture of aluminum. Each summons notified defendant and the court of plaintiff's intention to challenge Customs' denial of particular protests, filed pursuant to 19 U.S.C.§ 1514, regarding the classification of these bricks. Customs had classified the blocks under item 517.61 of the former Tariff Schedules of the United States (TSUS) (1981), and had assessed duties accordingly. Plaintiff protested that the bricks were properly entitled to duty-free entry as "other" refractory bricks, under TSUS item 531.27.

On July 22, 1983, plaintiff Eastalco filed Complaints in two of the actions: 83-1-00095 (which encompassed entries of carbon refractory *bottom* bricks) and 83-1-00097 (which encompassed entries of refractory carbon *sidewall and corner* bricks). Defendant filed answers to these complaints on December 6, 1983, which denied plaintiff's demand for refunds, but contained no counterclaims or other demands for monetary relief in favor of the Government.

On January 11, 1984, plaintiff moved, with the consent of defendant, to consolidate Court Nos. 83-1-00095 and 83-1-00097 for purposes of trial; to have the consolidated case designated a test case pursuant to court rule 84; and to suspend ten (10) other summonses, pending disposition of the test case. The court granted this motion, and, on January 26, 1984, deemed the consolidated complaint filed. Defendant filed its answer to the consolidated complaint on March 26, 1984. Other cases were later suspended under the test case.

On January 14, 1985, defendant moved to amend its answer to the consolidated complaint in order to allege, by way of counterclaim, that the imported bricks involved in the consolidated test case were classifiable under TSUS item 517.91, a broad provision covering "other" articles of carbon or graphite. The provision carried a higher rate or duty than Customs' initial classification under TSUS item 517.61. Plaintiff did not oppose this motion to amend the pleadings. On February 12, 1985, the court granted defendant's motion to add the counterclaim in the test case. Plaintiff filed a reply to defendant's counterclaim on February 15, 1985.

The test case was tried on December 19, 1985, and submitted for decision. On September 23, 1986, the court issued an interlocutory Opinion and Order in the test case. *Eastalco Aluminum Co. v. United States*, 10 CIT 622 (1986). The court determined that plaintiff had overcome the

presumption of correctness attaching to the Government's initial classification of the merchandise as "electrodes" under TSUS item 517.61. The court, however, had insufficient information to determine whether the goods were classifiable as "other" refractory bricks, as claimed by plaintiff, or whether the category claimed by defendant in its counterclaim applied. Accordingly, the case was remanded to Customs for further findings.

Following remand, the Court conducted an additional fact finding in the test case addressed to the issue of whether the imported bricks were "crystalline or substantially crystalline", as is required for classification as refractory brick under TSUS item 531.27.

On October 19, 1989, the court entered its final decision and judgment in the test case. *Eastalco Aluminum Co. v. United States*, 13 CIT ___, 726 F. Supp. 1342 (1989), *aff'd* Appeal No. 90-1130 (October 18, 1990). The court held that the merchandise was not classifiable as refractory brick. Judgment in favor of the Government was entered on the counterclaim for classification under the general provision, TSUS item 517.91, as found by Customs on remand.

Defendant's motion herein was filed prior to resolution of the appeal in this matter.

Discussion

I. *The Suspension/Test Case Procedure:*

This is a case of first impression regarding this court's unique "test case/suspension" procedure. Defendant fears that because of this court's decision on the counterclaim in the test case, plaintiff will voluntarily dismiss the suspended cases, thereby preventing the government from collecting the full amount of additional duties and interest due on the merchandise involved in the suspended cases.

While the court may look to decisions regarding the Federal Rules of Civil Procedure (Fed. R. Civ. P.) for guidance in interpreting its own rules, *see* CIT Rule 1, such decisions are of limited value in a case such as this due to its relation to a procedure not found in the Fed. R. Civ. P. Under the rules of this court, parties to actions involving similar issues of fact or law may move to "suspend" the action pending the outcome of a designated "test case" involving the aforementioned issues. *See* CIT Rule 84. While this procedure is similar to stay of proceedings under general federal procedure, it has its own history and some differences, notably a case may be suspended after the filing of a summons but before the filing of a complaint.

The special procedure was designed to deal with problems caused by the interplay of two factors. The first factor is the nature of importing, which often involves continuing entry of merchandise during the pendency of an action with regard to identical or similar merchandise. The second factor is the well established principle that the outcome of a classification case is not *res judicata* with respect to merchandise which is not the subject of the actual transactions before the court. *United States v. Stone & Downer Co.*, 274 U.S. 225, 230-237 (1927). If not for the "test

case/suspension" procedure or a similar stay procedure, litigation of tariff classification disputes would involve many suits covering similar issues of fact and law and unwieldy consolidations. *See e.g. Old Republic Ins. Co. v. United States*, 9 CIT 190, 191 n.5 (1985), *quoting H.H. Elder & Co. v. United States*, 69 Cust. Ct. 344, 345 (1972). A strong *stare decisis* rule together with the suspension procedure has been an efficient way of resolving these disputes.

The suspension/test case procedure, which, as indicated, includes the right to file a summons without filing a complaint, was devised before the court obtained jurisdiction to render judgments on counterclaims. The court has very brief rules governing circumstances in which counterclaims may be filed and these rules do not address the suspended case issue. The rules also do not distinguish between compulsory and permissive counterclaims. *Compare* CIT Rule 13(a) and (b) with Fed. R. Civ. P. 13(a) and (b). Background relating to the court's counterclaim jurisdiction and thus to plaintiff's argument that any counterclaim was compulsory in the test case follows.

II. *The Court's Counterclaim Jurisdiction:*

Prior to 1980, in any action brought to contest the denial of a protest, the United States Customs Court could determine only whether an importer had met a dual burden of proof to (1) overcome the presumption of correctness attaching to the protested Government decision and (2) establish the correctness of its own asserted classification, rate of duty, or appraised value. In cases where a litigant proved the Government's decision erroneous but where the Government proved a classification, rate of duty, or appraisement which would have resulted in a higher duty than was assessed administratively, the court was without power to order the plaintiff to pay the higher duties. H. Rep. No. 96-1235, 96th Cong., 2d Sess. 35 (1980); *see also J.E. Bernard & Co. v. United States*, 64 Cust. Ct. 525, 527, C.D. 4029 (1970) (citing cases), *appeal dismissed*, 58 CCPA 165 (1970).

In 1980, Congress amended the law to eliminate plaintiff's dual burden of proof, thereby requiring the court to find the correct classification if plaintiff proved the government's classification erroneous. *See* 28 U.S.C. § 2643(b) (1988); *Jarvis Clark Co. v. United States*, 733 F.2d 873, 877-78; *House of Adler. Inc. v. United States*, 2 CIT 274, 277-78 (1981) (citing H. Rep. No. 96-1235, 96th Cong., 2d Sess. 60-61 (1980)).[1] In the same legislative package Congress also expanded the jurisdiction of the court. *See Customs Courts Act of 1980*, P.L. 96-417, 94 Stat. 1727 (the "Act"). Section 201 of the Act gave the court jurisdiction to entertain certain counterclaims as follows:

> In any civil action in the Court of International Trade, the Court shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim or third-party action of any party, if (1) such

[1] Thus, whether a counterclaim is filed or not, if the government's original classification is disproved, the inquiry continues.

> claim or action involves the imported merchandise that is the subject matter of such civil action, or (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise.

28 U.S.C. § 1583.

This grant of jurisdiction sparked much controversy during Congressional consideration of the Act. Disagreement existed over whether the court should be granted jurisdiction over any counterclaims against a private plaintiff and if so, whether such jurisdiction would extend to the subject matter of (1) any civil action by such party pending before the court, (2) any civil action involving the same type of merchandise as the claim under litigation, or (3) only the merchandise in the transaction immediately before the court.

S. 1654, a bill introduced on August 2, 1979 stated:

> The Court of International Trade shall have jurisdiction to render judgment upon any setoff, demand, or counterclaim asserted by the United States which arises out of the same import transaction pending before the Court or a claim to recover upon a bond relating to the importation of merchandise or to recover customs duties.

A Senate Report accompanying this bill noted that "The circumstances in which a counterclaim may be asserted are quite limited. A counterclaim may not be asserted unless in effect it arises out of the same import transaction pending before the court." S. Rep. No. 96-466, 96th Cong., 1st. Sess. 13 (1980). A bill introduced into the House of Representatives, H.R. 6394, on January 31, 1980, provided for broader counterclaim jurisdiction as follows:

> The Court of International Trade shall have exclusive jurisdiction to render judgment upon (1) any counterclaim asserted by the United States which arises out of an import transaction that is the subject matter of a civil action pending before the court, or (2) any counterclaim of the United States to recover upon a bond or customs duties relating to such transaction.

The controversy is reflected in transcripts of hearings held by the House Judiciary Committee on February 13 and 28, 1980. Importers' groups stressed that they would be subject to counterclaims unrelated to the subject matter involved in the active litigation. Government representatives, on the other hand, stressed the unsatisfactory nature of the traditional system, whereby a higher tariff classification could be assessed on subsequent entries but the litigated and suspended entries would escape proper duties. The House Report which accompanied the Act summarizes the controversy:

> Under the provision proposed in H.R. 6394, it would be possible for the court to rule that a plaintiff should pay additional duties to the United States on the basis of the counterclaim asserted and proved by the United States. That provision would allow the counterclaim to be asserted not only with regard to the particular matter which gave rise to the civil action being litigated but also as to all other civil actions pending in the Court of International Trade involving import transactions by the same plaintiff.

Several witnesses strongly recommended the deletion of this provision from the legislation. They claimed that the counterclaim provision would permit the Government to exact additional duties from importers months after the importer has moved his goods into the stream of commerce at a price that accounts for the duties assessed by the Customs Service. These witnesses testified that the inclusion of the counterclaim provision fails to recognize the unique Customs Court practice known as the suspension process.

The Association of the Customs Bar summed up the position of a large segment of the private bar when it testified that the inclusion of the counterclaim provision "can only have a chilling effect on the commencement of litigation in the Court of International Trade." The private bar's concern rested fundamentally on the fact that the counterclaim provision would expose private litigants to uncertainty as to an importer's ultimate liability, particularly when the Government files a counterclaim challenging a valuation that is not the subject of the complaint filed by the plaintiff. Other witnesses contended that the Government has ample opportunity prior to and after liquidation to reassess the initial valuation or classification and should not be accorded still another opportunity to collect a higher duty on goods long released into the stream of commerce, particularly after the Government's rights under section 501 of the Tariff Act of 1930 have lapsed.

The American Importers Association (AIA) opposed the inclusion of the counterclaim provision, as it appeared in H.R. 6394. The Association did not believe that "permitting the Government to raise counterclaims on suspended cases, many of which will never come to trial * * *could promote judicial efficiency." In light of that concern, AIA originally recommended that the provision be limited to "the import transaction that is the subject matter of the civil action before the Court." Subsequently, in response to a question from Congressman John Seiberling, AIA agreed that limiting the counterclaim to "the imported merchandise" would be a reasonable limitation.

Assistant Secretary of the Treasury Richard J. Davis pointed out that the counterclaim provision would facilitate judicial economy and would not have an undue chilling effect. He indicated that there is nothing extraordinary about litigants and their lawyers having to balance the likely benefits of proposed litigation against the possibility of counterclaims.

"On the one hand, by allowing some counterclaims involving the same importer which we do propose be done, you're in the position of consolidating litigation, getting disputes between the same parties resolved more quickly. The fact that somebody has to consider whether they are subject to claims when they bring suit is the kind of judgment lawyers are called upon to make in a whole host of occasions when they have to advise clients whether it's prudent or not prudent to come forward and bring litigation."

> It is the Administration's position that the Government should not be precluded from asserting a claim that would allow the court to make the proper determination and accordingly would enable the Government to collect the full amount of duties.
>
> After extensive discussion the Subcommittee adopted an amendment limiting the Government's counterclaim to "the imported merchandise." *This amendment strikes a compromise between the need of the Government to recover the proper amount of import duties and the exposure of the importer to additional liability.* During the full Committee's consideration of H.R. 7540, an amendment to delete the provision from the bill was defeated.[2]

H.R. Rep. No. 1235, 96th Cong., 2d Sess. 35-37, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3746-48. (Footnotes deleted) (Emphasis in last paragraph added, other emphasis in original). *See also Customs Courts Act of 1980: Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96 Cong., 2d Sess. 131-32 (1980).

Apparently, the government believes that the "compromise" that was reached lies between the Scylla of the August 2, 1979 version of S. 1654, which would have limited the court's counterclaim jurisdiction to *the* import transaction that is the subject of *the* civil action before the court, and the Charybdis of the January 31 1980 version of the same l which would have allowed the Government to assert counterclaims regarding the classification or appraisement of any merchandise or transaction by the same importer pending before the court. That is, defendant believes that by limiting jurisdiction to counterclaims which involve the imported merchandise, Congress intended to extend counterclaim jurisdiction to cases involving the *same type of merchandise* as the litigated or "test" case. *See* Brief in Support of Defendant's Motion For Removal at p. 11.

In *United States v. Lun May Co.. Inc.*, 11 CIT 18, 652 F. Supp. 721 (1987) (dismissing a counterclaim by a private party extending to all merchandise covered by the bond at issue), the court found the plain words of the statute to indicate the transaction specific counterclaim jurisdiction of the type first contemplated by the Senate. An argument can be made that the particular issue involved here was not before the court in *Lun May*, but the court need not reach the issue of the applicability of *Lun May* to the case at hand. The court is convinced that even if counterclaim jurisdiction reaching to merchandise similar or identical to that involved in the test case exists, such counterclaims are not compulsory and need not be asserted in the test case. Some background on the scope of compulsory and permissive counterclaim is necessary to an understanding of the court's ruling in this regard.

According to Fed. R. Civ. P. 13(a) and (b):

> **(a) Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transac-

[2]The language of H.R. 7540 is codified as 28 U.S.C. § 1583.

> tion or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is stating any counterclaim under this Rule 13.
>
> **(b) Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

The compulsory counterclaim rule, by which claims arising out of the same transaction or occurrence as the opposing party's claim are waived if not pleaded in the action, promotes judicial economy by requiring litigants to resolve their grievances arising out of a single set of circumstances in one action. The framers of Rule 13 wished to strike a balance between the need for judicial economy and the right of a claimant to choose the time and the forum in which to assert the claim.

The purpose of Rule 13(a) is to enable the court to settle all related claims in one action and avoid the wastefulness of multiplicity of litigation on claims arising from a single transaction or occurrence. The rule goes beyond "the barring effect of the doctrines of former adjudication." Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d § 1409 (1990). A counterclaim is compulsory if it bears a logical relation to the opposing party's claim:

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness to their connection as upon their logical relationship. * * * Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations * * * does not matter.

Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926).

This court, however, has not adopted Fed. R. Civ. P. 13(a) and (b). To act as if it had would severely prejudice defendants. Furthermore, there is no indication that Congress wished to upset the court's suspension procedures,[3] to provide any general rule on compulsory versus non-compulsory counterclaims in this court, or to change the law regarding the *res judicata* effects of a classification decision. Congress either decided to allow counterclaims involving the import transactions involved in a particular case or slightly broader counterclaims relating to the same type of merchandise, if litigation regarding such merchandise also is pending. Congress' focus was not on this fairly technical distinction, but on the

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[3] Broad use of "permissive" counterclaims of the type discussed here would cause some disruption of the suspension scheme.

distinction between no counterclaims and counterclaims involving wholly unrelated merchandise. It clearly rejected these two extremes.

Because the court has not adopted a compulsory counterclaim rule going beyond "the barring effects of the doctrines of former adjudication," claims related to merchandise not covered by the entries immediately before the court should not be considered "inextricably intertwined" with resolution of the case before the court. Of course, under a broad reading of *United States v. Lun May Co., Inc.*, supra, counterclaims involving non-subject entries could not be made in the test case.

Having disposed of plaintiff's alternative claim that defendant had waived its counterclaims by not asserting them in the test case, the court turns to the issue of under what circumstance plaintiff loses its right to voluntarily abandon cases under CIT Rule 41(a).

Part III. *Right to Voluntarily Dismiss Under Rule 41(a):*

CIT Rule 41(a) provides in part as follows:

> (1) BY PLAINTIFF-BY STIPULATION. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (A) by filing a notice of dismissal which shall be substantially in the form set forth in Form 7 of the Appendix of Forms at any time before service by the adverse party of an answer or motion for summary judgment, whichever occurs first, or (B) by filing a stipulation of dismissal, which shall be substantially in the form set forth in Form 8 of the Appendix of Forms, signed by all parties who have appeared in the action.

This rule mirrors Fed. R. Civ. P. 41(a) and on its face gives plaintiff a right to dismiss a case without court action or agreement of other parties "at any time" before an answer or motion for summary judgment has been served.

This apparently absolute right has been limited in at least one court of appeals case, *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir.) *cert. denied*, 345 U.S. 964 (1953). In that case the court reversed a denial of a motion to vacate a voluntary dismissal. The dismissal was filed after an extended hearing on the merits of a case involving the specific performance of a sales contract. The hearing took place in the context of adjudication of a motion for preliminary injunction against any other sale by defendant. The court noted that Rule 41(a) was to apply to an early stage of a proceeding. But as indicated in 5 J. Moore, *Moore's Federal Practice* para. 41.02[3], 41-27, 41-28 (2d ed. 1988), most courts have declined to follow *Harvey*. Some have rejected it, *see e.g. Winterland Concessions Co. v. Smith*, 706 F.2d 793, 795-96 (7th. Cir. 1983); *Carter v. United States*, 547 F.2d 258, 259 (5th Cir. 1977),[4] while others, including the Second Circuit itself, have limited it to its facts. *See Thorp v. Scarne*, 599 F.2d 1169, 1174-76 (2d Cir. 1979); *Littman v. Bache & Co.* 252 F.2d 479, 481 (2d Cir. 1958).

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[4]The *Carter* court did not cite *Harvey*.

Thus, it appears that plaintiff's right to dismiss under Rule 41(a) should not be curtained until an answer, or the best equivalent of an answer under the test case/suspension procedure, is served.

IV. *Procedures Available:*

At this point there is no court rule providing for any "equivalent to an answer" in the test case/suspension procedure, and there is no way to file an answer in a case suspended before a complaint is filed.[5]

As the court understands it, at the time defendant obtained permission to amend its answer to include a counterclaim in the test case, suspension had already occurred in most of the cases at issue. The easy solution of not consenting to suspension until all pleadings were served, while technically available to defendant, probably would not have occurred to defendant as an option to consider until it knew it had a counterclaim. At the point it knew it had a counterclaim to assert in the suspended cases, all of which involve merchandise identical to one or the other test case, defendant could have taken some action. Unfortunately, what action it should have taken is not clear.

Under CIT Rule 7 an answer cannot be filed until a complaint is filed. The Customs Court found that a summons in this court

> is a document which is in all respects at least the equal of a summons and complaint in any other court. In my opinion it was intended to serve the role of a complaint with the one characteristic of *permitting the action to remain quiescent.*

The *Rubberset Company v. United States*, 68 Cust. Ct. 370, 372, 342 F. Supp. 749, 751-52 (1972) (emphasis added). But *Rubberset* predates this court's counterclaim jurisdiction and the court doubts that even the *Rubberset* court conceived of an answer to a summons. Furthermore, filing an answer is not the same as remaining "quiescent."

Defendant may have had the option of moving earlier to end suspension so that pleadings could be filed, but it is unclear whether it could do so if it intended to resuspend the case. CIT Rule 84(g) states:

> A suspended action may be removed from the Suspension Calendar only upon a motion for removal. A motion for removal may be granted *solely for the purpose of moving the action toward final disposition*. An order granting a motion for removal shall specify the terms, conditions and period of time within which the action shall be finally disposed. [Emphasis added]

While this "pre-counterclaim jurisdiction" rule may not have contemplated the lifting of suspension for purposes of ultimate resuspension, it may have to be read broadly to accommodate the procedural problems raised by counterclaims.[6] Use of Rule 84 in such a manner, however, is likely to cause useless expenditure of judicial time. Motions to lift sus-

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[5] Presumably if a case were merely "stayed" after complaint a motion to lift stay could be filed along with a proposed answer. Whether this would be equivalent to service of an answer under Rule 41(a) need not be decided here.

[6] To do otherwise probably would defeat the purpose of the test case/suspension procedure for an entire class of entries, that is, those involving counterclaims.

pension for resuspension purposes seem nonproductive even if they are permissible.[7] The court concludes therefore, that there was no procedure clearly available to defendant at the time it filed its counterclaim in the test case which allowed for any relevant action in the suspended cases.

V. *Procedures for this Case:*

The question that arises now is whether defendant should be permitted to utilize some procedure now devised or recognized by the court to preclude voluntary dismissal under rule 41(a) now that the test case has been litigated fully. At oral argument plaintiff asserted that it has relied on the absolute rights given to it under Rule 41(a) in determining its litigation strategy. That is, it assumed that should it lose the test case, its potential liability for additional duties would be limited to the test case. Given the lack of clarity of the rules as a whole, as applied to this area, and the less than clear language of the counterclaim statute and its history, the court doubts that plaintiff was justified in assuming that defendant's consent to suspension would protect plaintiff from counterclaim liability. Plaintiff could give no reason why defendant might have a sound strategy in waiting to clarify the status of its potential counterclaims and defendant has asserted by affidavit that it had no such strategy. Accepting *arguendo* plaintiff's description of its own strategy, plaintiff should not have based its entire strategy on an assumption that the court would not relieve defendant of the effects of a simple mistake.[8]

Defendant's view is that until the court took action on the instant motion, or plaintiff agreed *not* to voluntarily dismiss its actions pending resolution of these motions in exchange for consent to an extension of time relating thereto, plaintiff was free to dismiss its actions. The court need not decide exactly when plaintiff's rights were curtailed. The court agrees with defendant, however, that plaintiff has attempted to preserve all options despite the full litigation of the test case, and despite the pitfalls presented by the lack of a clear procedure. Plaintiff wanted to preserve the possibility of a monetary recovery without risking any loss even on identical merchandise. Litigation involves some risks and, at this point, plaintiff no longer retains all options.

Defendant has given fair notice through these motions, if it did not do so by its counterclaim in the test case, that it intends to assert counterclaims in the cases involving the motions before the court. Rule 41(a) provides a right to dismiss freely only through the time of serving of an answer, even without a counterclaim. Because defendant was limited to filing motions for removal from suspension, and not counterclaims, in the suspended cases, plaintiff likely kept its options for a little while longer than usual.

As indicated, the court finds that the rules are unclear in this area. The parties should have requested clarification of this matter for purposes of

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[7] Lifting of suspension for remand to Customs has much the same problem and seems completely useless because the court has decided the relevant issues already.

[8] The court does not rule the defendant actually erred in its interpretation of the rules, only that it made an error in judgment in not requesting clarification at an early date; plaintiff made the same error.

this litigation at an early date, and neither party was entitled to rely on any particular interpretation of the rules. As the parties are equally at fault in not raising this matter earlier or were otherwise mistaken, and because both parties would be equally prejudiced by a ruling in favor of the other, the court will rule in the interest of justice, that is, it will provide relief so that there may be the opportunity for any duties owed under the law to be collected in the suspended cases involving identical merchandise. This appears to be a fair result well within the contemplation of the test case/suspension rules. Therefore, in each of the cases in which the motions discussed herein have been filed plaintiff is prohibited from asserting its ordinary rights under Rule 41(a) to dismiss without leave of court. The court further holds that in all other actions currently suspended under the test case herein plaintiff shall be prohibited from voluntarily dismissing such actions under Rule 41(a) as soon as defendant files a "notice of potential counterclaim" in the particular case.[9]

Unless and until the rules of the court are modified to clarify the procedures to be followed should defendant desire to assert a counterclaim in a suspended case, defendant would be wise to decline to consent to suspension until pleadings are filed in cases potentially involving counterclaims, or if suspension is already in effect to give early notice by motion or otherwise of its intentions regarding counterclaims. Likewise plaintiffs would be wise not to simply rely on a previous consent to suspension as a waiver of counterclaim in a suspended case. Early notification of intentions will allow parties to better assess their risks and the court to resolve these issues at an early stage. It is also in keeping with the spirit of Rule 41(a) and the suspension/test case procedure which are intended to foster efficient disposition of actions.

(Slip Op. 90–113)

IPSCO, INC. AND IPSCO STEEL, INC., PLAINTIFFS, AND ALGOMA STEEL CORP., LTD., AND SONCO STEEL TUBE DIV., FERRUM, INC., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND LONE STAR STEEL CO., DEFENDANT-INTERVENOR

Court No. 86-06-00753

[Remanded determination affirmed.]

(Dated: October 30, 1990)

Barnes, Richardson & Colburn (*Rufus E. Jarman. Jr.*, *Josephine N. Belli*) for plaintiffs.
Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Jeanne E. David-*

[9]Defendant has three days to accomplish this. After passage of such time without the filing of such notice plaintiff may exercise its Rule 41(a) rights in such cases.

son), for defendant; (*Craig L. Jackson*) Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Dewey, Ballentine, Bushby, Palmer & Wood (*Michael H. Stein*) and *Akin, Gump, Strauss, Hauer & Feld* (*Warren E. Connelly, Valerie A. Slater*) for defendant-intervenor.

OPINION

RESTANI, *Judge*: This challenge to an original antidumping determination by the Department of Commerce (Commerce or ITA) regarding Canadian oil country tubular goods (OCTG) is before the court following a third remand.

All of the issues discussed here concern proper calculation of constructed value for foreign market value purposes. *See* 19 U.S.C. § 1677b(e) (1988). In *Ipsco, Inc. v. United States*, 12 CIT ___, 687 F. Supp. 633 (1988) (*Ipsco I*) the court addressed several issues including a cost allocation between limited services and prime OCTG and amortization of extraordinary costs of production. Remand on the first issue was ordered. In *Ipsco Inc. v. United States*, 13 CIT ___, 714 F. Supp. 1211 (1989) (*Ipsco II*) the court remanded the first issue once more but with more specific instructions. Following the second remand the antidumping margin was reduced by 1.15 percent, but Ipsco objected that ITA erred in its recalculation because it did not utilize a full six months of data for a particular grade of OCTG. This issue was quite distinct from the allocation methodology discussed in *Ipsco I* and *Ipsco II*. Nonetheless, in *Ipsco Inc. v. United States*, Slip Op. 90–37, at 7 (April 16, 1990) (*Ipsco III*) the court once more remanded for ITA to determine:

> whether it used correct tonnage data and dollar to tonnage ratios and, if not, whether the error occurred in the original determination, whether it was germaine to the original determination, and whether Ipsco could have discovered the problem after the original determination through the exercise of the amount of diligence appropriate under the facts of the case.

In the third remand determination ITA states that due to the passage of time and departure of employees it cannot determine exactly why three months of data were utilized but that it is clear that ITA did use just three months of data for the grade of OCTG at issue. ITA states that because sales did not occur in the following quarter there would have been no need to use data from that quarter and that, in any case, utilization of the second quarter data would raise the margins.

Ipsco responds as follows:

> 1. An error did occur because 19 U.S.C. § 1677b(e)(1)(a) requires ITA to examine costs "at a time preceding the date of exportation * * *." Ipsco opines that exportation refers to shipment and shipment occurred throughout the six months period.
>
> 2. Although it does not deny that use of only one quarter of data was relevant from the outset, Ipsco alleges that it exercised due diligence in examining the record. It alleges that the error was masked by ITA's limited service, prime misallocation and Ipsco should not be found responsible for discovering this error before the allocation was corrected.

3. Use of six months of data would not result in a higher margin if ITA were directed to normalize costs for this product as it indicated, in the final determination, would be done.

4. Even without normalization margins would still be lower if ITA treated work-in-process in the same manner for both quarters.

The court turns first to the normalization issue. This is not a new issue in this case. This was a hotly contested issue at the agency level, and plaintiff had some success, that is, it turned ITA's preliminary view around to some extent, as stated in the final determination:[1]

> IPSCO incurred abnormally high costs for certain products which it recently started producing. However, the normalized cost data submitted by Ipsco was not sufficiently substantiated. At verification, information was gathered regarding yield rates during and after the period of investigation. Where such information was available, the low yield rates in the period of investigation were normalized, in keeping with the Department's policy of amortizing start-up costs over future production.

Antidumping; Oil Country Tubular goods From Canada: Final Determination of Sales at Less Than Fair Value, 51 Fed. Reg. 15029, 15032 (April 22, 1986), *as amended* 51 Fed. Reg. 29579 (Aug. 19, 1986).

The final determination stated further:

> The normalized cost information submitted by IPSCO is based on standard costs contained in IPSCO's annual management budget adjusted for inflation using a broad index of price levels. The standard costs contained in the budget are not used by IPSCO in its cost accounting system. This information is not sufficient to substantiate the level of production costs under normal operating conditions. However, as stated in our response to Petitioner's Comment 16, we have amortized costs related to low yield rates on initial production runs over present and estimated future production, where yield rates for subsequent production were available and were lower.

Id. at 15036.

This issue also is not new to the court. It is discussed in Ipsco I, 687 F. Supp. at 638-640. Obviously Ipsco knew from both ITA's final determination and its own review of the record that not all products were normalized and it knew enough to argue this point strongly from the beginning. According to Ipsco, with proper normalization of this, its most important limited service product for the period at issue, the margin would be lowered in excess of ten percent. Any argument specific to this grade should have been made in connection with the court's original consideration of this issue. The court found in *Ipsco I* based on the record and argument of counsel that ITA's normalization decisions were correct. 687 F. Supp. at 639-40. Ipsco has presented no adequate reason why all facts relevant to normalization could not have been raised when this issue was before the court. In fact, the court is not aware that there are

[1] The court accepts plaintiff's reply brief which addresses this issue in some detail.

any particular facts related to this product that were not raised and considered. As far as this court is concerned, this issue has been laid to rest and Ipsco has not met the burden necessary to resurrect it.

Apparently, without normalization, the margin swing would not exceed three percent even under plaintiff's view of work-in-process. Nonetheless three percent may be a significant difference from plaintiff's point of view, thus the issue of three versus six months of data must be addressed.

Even at this late date the parties have not briefed the question of whether ITA erred in using one quarter of data for the grade at issue. Neither side has discussed, in any detail, the relevance of sales versus delivery in regard to of 19 U.S.C. § 1677b(e)(1)(A). Neither has it been demonstrated that delivery data, in addition to sales data, is in the record. These are exactly the types of issues that Ipsco should have discussed with ITA, if Ipsco possessed ITA cost sheets prior to litigation. Assuming *arguendo* that it did not have sufficient information to address this issue prior to litigation, Ipsco could have addressed the issue as soon as it obtained the full record following the commencement of litigation. ITA's cost sheets seem to indicate exactly the volume of tonnage used by ITA. For this important grade Ipsco can be held responsible for comparing its own submissions to ITA generated data.

Plaintiff asserts, assuming *arguendo* that the "error" was discoverable, that it should not be held to have failed to use due diligence in discovering the error. Plaintiff alleges that ITA's allocation error masked the effect of ITA's data selection. One must recall that both ITA and Ipsco were under misapprehension as to how to allocate properly. The court rejected both views. It was quite possible that any masking was the result of Ipsco's own erroneous methodology.

Whatever the source of confusion, the relevant tonnage data was in the original record, it was significant to the outcome of the original determination, it involved an important product, and it could have been found without *unduly* burdening plaintiff. This does not mean that plaintiff could find the error easily or that its discovery involved *no* burden. Examination of the record involves cost and effort, but parties choose how much time and expense they will invest in examining the record and unearthing errors. While plaintiff's actions may be entirely understandable, they cannot be countenanced. Judicial economy, fairness to the parties and the need to fulfill Congress's intent of prompt resolution of these matters requires that errors of methodology, data selection, calculation, etc. all be raised from the outset, unless some extraordinary factor supports relief at a later date. The court finds no extraordinary factor present here. ITA's error of allocation did not relieve Ipsco of the duty to examine the record for other significant errors. Unless a thorough examination of the record is made prior to briefing, the court and the parties risk becoming involved in unnecessary litigation of unimportant issues.

Because the court declines to decide at this late date whether ITA should have used an additional quarter of data for the grade of OCTG at issue, it need not address the issue of ITA's methodology regarding work-in-process.

Accordingly, ITA's determination on remand is sustained.

(Slip Op. 90–114)

HERMLE BLACK FOREST CLOCKS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-08-01003

OPINION

[On classification of gong rod units for clocks, judgment for the defendant.]

(Decided October 30, 1990)

Sandler & Travis, P.A. (*Leonard L. Rosenberg* and *Robert G. Schrader*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Al J. Daniel, Jr.*); *Sheryl A. French*, U.S. Customs Service, of counsel, for the defendant.

AQUILINO, *Judge*: The plaintiff challenges classification of tuned metal rods from Germany by the Customs Service under item 720.86, Tariff Schedules of the United States ("TSUS")("Assemblies and subassemblies for clock movements, consisting of two or more parts or pieces fastened or joined together: * * * Other assemblies and subassemblies: * * * For other movements * * * 11.2% ad val. + * * * 0.52 cents for each other piece or part"). The plaintiff claims classification should have been as percussion musical instruments, pursuant to TSUS item 725.34 ("Sets of tuned bells known as chimes, peals, or carillons: Containing not over 22 bells * * * 4.4% ad val.") or item 725.40 ("Other * * * 6.9% ad val.").[1]

I

In lieu of trial, the parties have submitted, and the court has accepted, a stipulation which sets forth the following salient facts, among others:

> 3. The merchandise * * * is tuned metal gong rods mounted to a metal base and commercially referred to as gongs * * *.
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[1]Alternatively, as discussed hereinafter, the court has been urged to consider TSUS item 652.60 ("Non-electric bells and gongs, and parts thereof, all the foregoing of base metal: * * * Other"), item 726.90 ("Musical instrument parts not specially provided for: * * * Other") or item 657.25 ("Articles of iron or steel, not coated or plated with precious metal: * * * Other") as possible, better classifications of the merchandise.

5. Prior to importation, the subject merchandise is tuned.

6. The subject merchandise is not attached to the pillar plate or any other part of the movement of a clock.

7. The subject merchandise is not physically attached to any other assembly or subassembly of a clock movement. The rod units, together with the Westminister chime movement and clock movement, are mounted in the clock cabinet. The rod units are mounted on the clock cabinet in position between two sets of chime hammers.

8. * * *

b. The hammers are part of the Westminister chime movement.

c. The hammers are mechanically activated by the conventional clock movement's time keeping function.

d. On a periodic basis (every 15 minutes), mechanical motion is transferred to the rod units from the hammers; however, there is no continuous contact between the rod units and the hammers.

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10. When hammers strike the various rods, a musical note or sound is produced at the quarter, half, three-quarter and hourly strikes * * *.

11. Each rod makes a separate and distinct musical note when struck by a particular hammer.

12. The hammers which strike the rod units are conventional nonelectronic movements with a multitude of moving parts * * *.

13. The ordinary clock movement which is mounted in the same clock cabinet as the rod units is a conventional nonelectronic movement with a multitude of moving parts * * *.

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16. * * * When struck by the hammers, the rod units or chime rods will announce the time audibly, produce notes, and the Westminister theme.[2]

II

The Customs Courts Act of 1980 provides that, in an action such as this, the decision of the Service is presumed to be correct and the burden of proving otherwise rests upon the party challenging the decision. 28 U.S.C. § 2639(a)(1).

In attempting to bear its burden herein, the plaintiff relies on the above stipulation and argues that the

> gong rod units are not parts, assemblies or subassemblies of clock movements. They are completely independent of the clock movement and are mounted separately in the case. * * * [I]t is evident from the case law interpreting "movements" that the provision is in-

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[2]Notwithstanding the merchandise's country of origin, the court presumes that the intended reference in this paragraph and in paragraphs 7 and 8.b above is to the abbey at Westminster in England, which is famous for its carillon, among other things.

In any event, each side's filing of a brief in conjunction with this stipulation was followed with a motion by the opposing party to strike all or part of that brief. Defendant's motion has already been denied by the court, and plaintiff's deserves the same fate. That is, in its papers in opposition, the defendant appropriately suggests that the court consider reserving decision on plaintiff's motion to strike, pending consideration of the merits, which has now made that motion irrelevant. Hence, it is denied.

> tended to encompass only those parts which are actually necessary for the mechanical timekeeping function, *i.e.*, plates, pillars, stakements, jewels, springs, drive gears, pinions, winding gears, etc., and which perform the necessary mechanical functions * * * to indicate time, *i.e.*, incremental movements of tiny gears which result in eventual movement of the hands on the face of a clock indicating the time.

Plaintiff's Reply Brief, pp. 9-10, citing *Texas Instruments Inc. v. United States*, 1 CIT 236, 518 F.Supp. 1341 (1981), *aff'd*, 673 F.2d 1375 (CCPA 1982), and *Belfont Sales Corp. v. United States*, 11 CIT 541, 666 F.Supp. 1568 (1987), *reh'g denied*, 12 CIT ____, 698 F.Supp. 916 (1988), *aff'd*, 878 F.2d 1413 (Fed.Cir. 1989). What is particularly notable about plaintiff's argument is its persistent usage *of* the preposition of when referring to clock movement(s).

When the argument is couched in such a precise manner, it has merit, particularly in view of the stipulation, *supra*, that the "subject merchandise is not attached to the pillar plate or any other part of the movement of a clock" and "is not physically attached to any other assembly or subassembly of a clock movement." In other words, at least for purposes of this action, the gong rod units are not assemblies or subassemblies[3] *of* the clock movements with which they are housed.

However, as quoted above, TSUS item 720.86 encompasses "*Other* assemblies and subassemblies: * * * *For other* movements" (emphasis added). And the parties have stipulated that the "hammers which strike the rod units are conventional nonelectronic movements" and "are part of the Westminister [*sic*] chime movement." Thus, every 15 minutes "mechanical motion is transferred to the rod units from the hammers".

According to the plaintiff, as noted above, "movement", as used in the TSUS, was "intended to encompass only those parts which are actually necessary for the mechanical time keeping function". But headnote 2(c), Subpart E of TSUS Schedule 7 (1983) defined "clock movement" as "any movement or mechanism * * * intended or suitable for measuring time", and the definition has been equally expansive in judicial decisions. *See, e.g., Herman H. Sticht & Co. v. United States*, 22 CCPA 362, T.D. 47386 (1934) (tachometers properly classified as clocks and clock movements under paragraph 368 of the Tariff Act of 1922); *Salentine & Company v. United States*, 64 Cust.Ct. 213, C.D. 3982 (1970), *aff'd*, 450 F.2d 908 (CCPA 1971)(carry-over mechanism intended to sustain time-switch rotation in event of power failure properly classified as clock movement). In the *Texas Instruments* case cited by the plaintiff, *supra*, the courts agreed that a movement, "in accordance with the common and commer-

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[3] Referring to Webster's Third New International Dictionary (1976), the plaintiff offers definitions of subassembly as "a structural unit manufactured * * * separately but designed to be incorporated with other units * * * of the finished product" and of assembly as "a collection of parts * * * form[ing] a complete machine, structure, or unit of a machine."

cial meaning of the term", signifies "a mechanism possessing moving parts to which or from which motion is transferred."[4]

Here, the parties have stipulated that "mechanical motion is transferred to the rod units from the hammers". Furthermore, "[w]hen struck by the hammers, the rod units or chime rods will announce the time audibly". In *Herman Miller Clock Co. v. United States*, 22 CCPA 332, 333, T.D. 47363 (1934), it was stipulated that the gongs at issue had "five unplated base metal rods * * * fastened into an iron or steel base * * * specially designed for use and * * * used exclusively in and as parts of Westminster chimes clocks". Customs had classified the units as "assemblies or subassemblies consisting of two or more parts", and the court of appeals, in affirming the Customs Court, found it was "fairly shown by the record that these [gongs] are assemblies or subassemblies, and that they constitute a part of the movements of the clocks of which they will ultimately be parts." *Id.* at 334.

The plaintiff contends that this *Herman Miller* decision and an earlier one involving the same company and reported at 63 Treas.Dec. 455, T.D. 46244 (1933) are inapposite because they did not consider as an alternative classification chimes or peals and involved substantially different tariff provisions. Plaintiff's Reply Brief, p. 3. This does not detract, however, from the finding that the merchandise constituted clock-movement assemblies or subassemblies.

In any event, the plaintiff argues that its merchandise is classifiable as percussion musical instruments, sets of tuned bells known as chimes, peals or carillons per TSUS item 725.34, taking the position that General Interpretive Rules 10(c)[5] and 10(ij)[6] require that the gong rod units be classified under that item because it most specifically describes them. The plaintiff refers to *M.J. Paillard & Co. v. United States*, T.D. 16219 (1895), and *J.C. Robold & Co. v. United States*, 43 Treas.Dec. 18, T.D. 39396 (1923), which held "musical instruments" the correct classification of mechanical singing birds in cages because they produced musical notes. The latter decision declined to confine the definition of musical instrument to instruments capable of emitting "a continuous melody * * * [or] upon which a chromatic scale can be played." 43 Treas.Dec. at 20. Of course, those birds, though animated by clockwork, were not clocks; their *raison d'etre* was periodic melody.[7] The plaintiff also refers to decisions classifying wooden temple blocks and triangles as musical instruments, namely, *United States v. Foochow Importing Co.*, 18 CCPA 313, T.D. 44562 (1931), and *United States v. Sears, Roebuck & Co.*, 7

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[4] 1 CIT at 239, 518 F.Supp. at 1343, referring to *United States v. Texas Instruments Inc.*, 620 F.2d 269 (CCPA 1980), *aff'g* 82 Cust.Ct. 272, C.D. 4810, 475 F.Supp. 1183 (1979). While the 1981 CIT decision dealt with watch, rather than clock, movements, as the plaintiff indicates, those for watches "generally vary only in size from clock movements". Plaintiff's Brief, p. 8.

[5] This rule provides that "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it".

[6] The language of this rule is that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part."

[7] Moreover, the court notes in passing that when *Paillard* and *Robold* were decided, no specific provision for "music boxes" existed in the tariff laws. *See, e.g., Amico, Inc. v. United States*, 586 F.2d 217, 220 n. 4 (CCPA 1978).

Ct.Cust.App. 60, T.D. 36388 (1916). As with *Paillard* and *Robold*, these cases did not delimit the term musical instrument: "for tariff purposes * * * a musical instrument may be said to be any sound-producing contrivance which, in this country, is chiefly used in making music, or in connection with making music to give volume, tone, or effect to the same." *Foochow*, 18 CCPA at 319. *See also Sears, Roebuck*, 7 Ct.Cust.App. at 61-63.

In this action, the court does not doubt that striking of the merchandise after encasement gives rise to pleasing sound, but as discussed in *Foochow*,

> if the articles before us are to be held musical instruments, then a handsaw, a hat, dish pan, jug, or broom handle, or the like, ofttimes used in connection with jazz music, must also be regarded as musical instruments. Under the foregoing definition, it is at once apparent that none of these articles could be regarded as musical instruments unless chiefly used as such in this country. It is a matter of common knowledge that their use in connection with music making is only incidental to very extensive uses in other fields.[8]

Heading 92-06 of the Explanatory Notes to the Brussels Nomenclature describes (at pages 1677-78 (1966)) "Other percussion instruments such as * * * (ix) Bells, sets of bells, chimes and tubular bells" as "a series of tubes suspended in a frame and struck either with a bare hand or with a hammer" but excludes "Chimes and other striking mechanisms for clocks", referring instead to heading 91.11, "Other Clock and Watch Parts". Chapter 91 lists (at page 1648 (1972)) the parts of clock movements and then provides that "Clocks or watches may be equipped with a striking work, an alarm mechanism or a set of chimes" which require a "special movement." Heading 91.11, in describing such a movement, refers to "Clock striking work" and explicitly includes "bell, gong, chimes" as part thereof. *Id.* at 1666. The Notes also refer to "a striking mechanism (hours, half-hours, or quarters) acting on a bell or gong, or a multigong chiming mechanism". *Id.* at 1654.

The U.S. Tariff Commission Summaries of Trade and Tariff Information for TSUS Schedule 7 list (at page 151, vol. 3 (1968)) "Sets of tuned bells known as chimes, peals, or carillons" as percussion musical instruments but also state:

> The percussion instruments of principal importance in the trade are cymbals, drums, chimes, peals, carillons, tuned handbells, glockenspiels, xylophones, marimbas, and a wide variety of rhythm instruments with percussive qualities. Such articles are generally used in rhythm bands for preschool and kindergarten children, and they include tambourines, triangles, maracas, gourds, castanets, claves, and other instruments.

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[8] 18 CCPA at 319. *See also Montgomery Ward & Co. v. United States*, 62 Cust.Ct. 718, 723, C.D. 3853 (1969)("it is clear that the intent under the tariff schedules is that an article should be classified as a true musical instrument * * * only if it is of such quality and character as would ordinarily be used for serious musical study or use"); U.S. Customs Service letter ruling 038376 (Jan. 23, 1976) ("wind chimes * * * do not belong to a class or kind of article chiefly used in the United States in making music"), Plaintiff's Brief, Ex. B, p. 2.

> The chimes, peals, and carillons considered here are used almost exclusively in churches or campaniles * * *. Educational institutions use drums, cymbals, and most of the other portable percussion instruments for school orchestras and bands and also often provide group or individual instruction.

Finally, headnote 1(iii) to Subpart F of TSUS Schedule 6, Part 3 (1983) excluded therefrom electric bells or gongs (referring to Part 5 of Schedule 6 (Electrical Machinery and Equipment)), bells or gongs which are musical instruments or parts thereof (referring to Part 3 of Schedule 7 (Musical Instruments, Parts, and Accessories)), and clock chimes and gongs (referring to Part 2E of Schedule 7 (Watches, Clocks, and Timing Apparatus)) and thus distinguished between bells which are musical instruments—as referred to, for example, in the Notes and the Summaries—and those which are clock chimes.

To summarize then, the references are to the effect that for an instrument to be musical, it must be used chiefly for the making of music and not for some other purpose. Since this court cannot attribute such a quantum of use to the merchandise at bar, the court cannot conclude that plaintiff's able presentation in favor of TSUS item 725.34 has overcome the statutory presumption of correctness which governs defendant's position on item 720.86.

III

In *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed.Cir.), *reh'g denied*, 739 F.2d 628 (Fed.Cir. 1984), the court of appeals held that this Court of International Trade

> cannot determine the correct result simply by dismissing the importer's alternative as incorrect. It must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative. In some cases, the government's classification may be so patently incorrect that the importer can overcome the presumption of correctness without producing a more satisfactory alternative. In other cases, the importer's alternative may have faults and yet still be a *better* classification than the government's. In either case, the court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand. [emphasis in original; footnote omitted]

In furtherance of this teaching, as indicated above, other alternatives have been raised for consideration, including TSUS item 726.90 ("Musical instrument parts not specially provided for: * * * Other"). In regard to this item, the plaintiff attempts to rely on *Atlanta University v. United States*, 39 Cust. Ct. 258, C.D. 1938 (1957), which involved a "Westminster striking mechanism with gear and four hammers". The mechanism was to be installed in a clock tower along with a clock, a 10-bell chime and a keyboard. The court rejected the government's argument that the striking mechanism was an assembly or subassembly for a clock and concluded instead that the item was part of a musical instrument. However, as stated by the court,

> for chimes to be musical instruments within the purview of the tariff act, it is essential that there be incorporated therewith a means of functioning. In the instance of the chimes installed at Atlanta University, it appears from the record that they may function either by a manually operated keyboard for the purpose of playing carols or by the mechanical means provided by the present importation which receives its electrical impulses from the tower clock on the quarter-hour periods * * *.

Id. at 261. The court relied on *Eidlitz & Son (Inc.) v. United States*, 12 Ct.Cust.App. 56, T.D. 39998 (1924), which upheld classification of a set of chimes played by means of a keyboard as a musical instrument. In *Atlanta University*, the chimes were involved in serious musical study and playing, and the striking mechanism was classified as part of that instrument. The same cannot be said for the gong rod units at issue here; they are only "played" within the framework of, and subject exclusively to, a clock.

Other suggested alternatives are "Non-electric bells and gongs" (TSUS item 652.60) and "Articles of iron or steel" (item 657.25). The former fell under Schedule 6, Part 3, Subpart F and therefore under headnote 1(iii), which, as stated above, explicitly excluded chimes intended for clocks. Similarly, item 657.25 entails reference to the Subpart G headnote which covered "only articles of metal which are not more specifically provided for elsewhere". Moreover, even if the gong rod units were covered equally by the foregoing suggested alternatives to item 720.86, General Interpretive Rule 10(d)[9] would preclude classification under them, as the latter carries a higher duty.

In conclusion, this court is not persuaded that the Service's classification of the merchandise at issue under item 720.86 was incorrect or that the TSUS otherwise contained a better classification. Judgment must therefore enter in favor of the defendant.

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[9]This rule states that, "if two or more tariff descriptions are equally applicable to an article, such article shall be subject to duty under the description for which the original statutory rate is highest"

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/479 10/18/90 Aquilino, J.	A Classic Time	86–12–01599	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/480 10/18/90 Aquilino, J.	Belfont Sales Corp.	86–1–00001	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/481 10/18/90 Aquilino, J.	Eastman Watch Co.	86–1–00002	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/482 10/18/90 Aquilino, J.	F & K Watch Co.	87–1–00030	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/483 10/18/90 Aquilino, J.	Juno Export	85–2–00163	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/484 10/18/90 Restani, J.	Powell River-Alberni Sales	87–3–00551	252.75 Various rates	252.67 Free of duty	Agreed statement of facts	New York Printing paper
C90/485 10/22/90 Aquilino, J.	Anchor Time Corp.	86–12–01598	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/486 10/22/90 Aquilino, J.	Branded Time Corp.	86–12–01595	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/487 10/22/90 Aquilino, J.	Eastman Watch Co.	86–12–01533	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/488 10/22/90 Aquilino, J.	Eastman Watch Co.	86–12–01593	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/489 10/22/90 Aquilino, J.	Miracle Watch Co.	86–12–01596	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/490 10/22/90 Aquilino, J.	Omni Quartz, Ltd.	86–12–01592	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/491 10/22/90 Aquilino, J.	S. K. Suppliers	86–12–01535	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/492 10/22/90 Aquilino, J.	Wallem Inernational Corp.	86–12–01597	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/493 10/23/90 DiCarlo, J.	Dataproducts Corp.	89-2-00079	410.22 15%	408.41 8.5%	Tomoegawa U.S.A., Inc., *v.* U.S. 12/2/88	Los Angeles Toner
C90/494 10/23/90 Aquilino, J.	Dynamic Supply, Inc.	86-4-00443	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/495 10/23/90 Aquilino, J.	Juno Export	86-4-00441	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/496 10/23/90 Aquilino, J.	Kwanasia of America, Inc.	86-4-00442	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/497 10/23/90 Aquilino, J.	Nastrix Corp.	86-2-00188	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/498 10/23/90 Aquilino, J.	Nastrix Corp.	86–4–00462	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/499 10/23/90 Aquilino, J.	S. K. Suppliers	86–4–00461	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/500 10/23/90 Aquilino, J.	So. American Watch Co.	86–4–00453	716.09–716.44 Various rates	688.45, 688.42, 688.43, or 688.40 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989)	New York Quartz analog watches, etc.
C90/501 10/23/90 DiCarlo, J.	Texsport	90–8–00379	384.25 or 381.33 Various rates	384.93 Various rates	Agreed statement of facts	Houston Aviator's overalls
C90/502 10/23/90 Aquilino, J.	World Forum Watch Co.	86–4–00440	716.09–716.45, or 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/503 10/24/90 Aquilino, J.	So. American Watch Corp.	87–1–00138	716.09–716.44 Various rates	688.45, 688.42, 688.43, or 688.40 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989)	New York Quartz analog watches, etc.
C90/504 10/26/90 DiCarlo, J.	Thomson-CSF, Inc.	90–3–00115	8471.10.00001 4.9%	9808.00.30009 Free of duty	Agreed statement of facts	Houston Analog/hybrid automatic data processing machines
C90/505 10/26/90 DiCarlo, J.	Kombi, Ltd.	88–7–00484	704.75 9.3%	735.07 5.9%	Agreed statement of facts	New York Ski glove liners

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V90/45 10/22/90 Watson, J.	Supermall Cargo, Inc.	88-3-00220	Transaction value	Represented by the cut, make and trim charges of Hong Kong tailors, plus additions for matierals or other assists required by 19 USC 1401a(b), plus packing costs	Agreed statement of facts	Los Angeles Made-to-measure clothing
V90/46 10/26/90 DiCarlo, J.	Zale Corp.	89-6-00381	Transaction value	Price paid by Zale of Hong Kong to the Hong Kong manufacturers and suppliers of the merchandise	Agreed statement of facts	New York Not stated

U.S. COURT OF INTERNATIONAL TRADE,
OFFICE OF THE CLERK,
New York, N.Y., November 1, 1990.

NOTICE OF AMENDMENTS TO THE RULES OF THE
UNITED STATES COURT OF INTERNATIONAL TRADE

The court, on October 3, 1990, approved certain amendments to the Rules of the United States Court of International Trade, which are to become effective January 1, 1991. The rules affected by these changes are: Rules 5, 6, 7, 40, 45, 50, 59, 67.1, 71, 89, Form 9 and Form 16.

Copies of the amendments were transmitted to the following sources for publication:

Matthew Bender & Co.
Bureau of National Affairs, Inc.
Clark-Boardman Company
Customs Record
Invictus Publishing Corporation
The Lawyers Co-operative Publishing Co.
Legi-slate, Inc.
Mead Data Central (LEXIS)
Oceana Publications, Inc.
Rules Service Company
Shepard's/McGraw Hill
United States Customs Service
West Publishing Company

If you have obtained a copy of the court's Rules from a commercial publisher, you may wish to communicate with that publisher to determine when the amendments will be available.

A copy of the amendments is available for examination in the court's Library and the Case Management Section.

JOSEPH E. LOMBARDI,
Clerk of the Court.

United States Court of International Trade

Chief Judge

Edward D. Re

Judges

~~[Paul P. Rao]~~
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford
~~[Frederick Landis]~~
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein
Nils A. Boe

Amendments to Rules 5, 6, 7, 40, 45, 50, 59, 71, 89, and Form 9

New Rule 67.1

New Form 16

October 3, 1990

Effective date:
January 1, 1991

Rules of the United States Court of International Trade

EFFECTIVE NOVEMBER 1, 1980
(AS AMENDED, [~~NOVEMBER 1, 1988~~] JANUARY 1, 1991)

Amendments to Rule 5

Rule 5 is amended as follows:

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) *Service – When Required.* * * *

(b) *Service-How Made.*

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon the party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery is made by: handing a copy to the attorney or to the party, or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. **Service by mail is complete upon mailing.**

(c) *Service – Numerous Defendants.* * * *

(d) *Filing – When Required.* * * *

(e) *Filing – How Made.*

The filing of pleadings and other papers with the court shall be made by filing them with the clerk of the court, except that the judge to whom an action is assigned, or a manner is referred, may permit pleadings and other papers pertaining thereto to be filed the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Filing with the clerk of the court shall be made by delivery or by mailing to: The Clerk of the Court, United States Court of International Trade, One Federal Plaza, New York, New York 10007, or by delivery to the clerk at places other than New York City when the papers pertain to an action being tried or heard at that place. **Filing is completed when received, except that a pleading or other paper mailed by registered or certified mail properly addressed to the clerk of the court, with the proper postage affixed and return receipt requested, shall be deemed filed as of the date of mailing.**

(f) *Filing of Summons and Complaint By Mail.* * * *

(g) *~~Service and Filing When Completed.~~*

[~~Service or filing of any pleading or other paper by delivery or by mailing is completed when received, except that a pleading or other paper mailed by registered or certified mail properly addressed to the party to be served, or to the clerk of the court, with the proper~~

~~postage affixed and return receipt requested, shall be deemed served or filed as of the date of mailing.~~]

[~~(h)~~](g) *Proof of Service.* * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; **Oct. 3, 1990, Eff. Jan. 1, 1991.**)

Amendments to Rule 6

Rule 6 is amended as follows:

RULE 6. TIME

(a) *Computation.*

* * *

(b) *Extension.*

(1) * * *

(2) * * *

(3) * * *

(c) *Additional Time After Service By Mail.*

Whenever a party has the right or obligation to do some act or take some proceeding within a prescribed **or allowed** period after the service of a pleading, motion, or other paper upon the party, and the service is made by mail, 5 days shall be added to the prescribed **or allowed** period.

(As amended, eff. Jan. 1, 1985; June 19, 1985; eff. Oct. 1, 1985, Apr. 28, 1987, eff. June 1, 1987; July 28, 1988, eff. Nov. 1, 1988; **Oct 3, 1990, eff. Jan. 1, 1991.**)

Amendments to Rule 7

Rule 7 is amended as follows:

RULE 7. PLEADINGS ALLOWED – CONSULTATION – ORAL ARGUMENT – RESPONSE TIME – SHOW CAUSE ORDER – FORM OF MOTIONS

(a) *Pleadings.* * * *

(b) *Motions – Consultation.* * * *

(c) *Oral Argument.*

Upon motion of a party, or upon its own initiative, the court may direct oral argument on a motion at a time and place designated as prescribed in Rule 77(c). **A motion for oral argument on a motion shall be filed no later than 20 days after service of the response to the motion, or 20 days after the expiration of the period of time allowed for service of a response.**

(d) *Time to Respond.* * * *

(e) *Order to Show Cause.* * * *

(f) *Form of Motions and Other Papers.*

(1) * * *

(2) * * *

(g) *Dispositive Motions Defined.* * * *

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1,1982; Oct. 3,1984, eff. Jan. 1,1985; **Oct. 3,1990, eff. Jan. 1,1991.**)

Amendments to Rule 40

Rule 40 is amended as follows:

RULE 40. REQUEST FOR TRIAL

(a) *Request.*

At any time after issue is joined in an action, unless the court otherwise directs, any party who desires to try an action shall: (1) confer with the opposing party or parties to attempt to reach agreement as to the time and place of trial, and (2) serve upon the opposing party or parties, and file with the court, a request for trial which shall be substantially in the form set forth in Form 6 in the Appendix of Forms. The request shall be served and filed at least 30 days prior to the requested date of trial, or upon a showing of good cause, at a reasonable time prior to the requested date of trial. A party who opposes the request shall serve and file its opposition within 10 days after service of the request, unless a shorter period is directed by the court. **In all instances where a trial is requested to be held at a location other than or in addition to the courthouse at One Federal Plaza, New York, New York, all other parties shall serve and file a response within 10 days after the service of the request, unless a shorter period is directed by the court.**

(b) *Designation.* * * *

[~~(c) *Marked Pleadings.*~~

~~After the action is designated for trial, the party requesting trial shall forthwith serve and file a copy of marked pleadings which shall consist of the following:~~

~~(1) A copy of the complaint and of any third party complaint briefly indicating in the margin thereof, at each numbered paragraph or article thereof, the manner in which the defendant or respondent, or any third party defendant or respondent impleaded who has served an answer thereto, treats the allegations contained in that paragraph of the complaint or third party complaint.~~

~~(2) A complete and accurate copy of each answer served by the defendant or respondent or any third party defendant or respondent impleaded in the action, similarly marked when a reply has been filed.~~

~~(3) A complete and accurate copy of each reply served in the action.~~]

[~~(d)~~](c) *Premarking Exhibits.* * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

(As amended, Oct. 3, 1990, eff. Jan. 1, 1991.)

Amendments to Rule 45

Rule 45 is amended as follows:

RULE 45. SUBPOENA

(a) *For Attendance of Witnesses – Form – Issuance.* * * *

(b) *For Production of Documentary Evidence.* * * *

(c) *Service.* * * *

(d) *Subpoena for Taking Depositions – Place of Examination.*

(1) * * *

(2) * * *

(e) *Subpoena for a Hearing or Trial.*

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within 100 miles of the place of hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, **or when the interests of justice may require,** the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) * * *

(f) *Contempt.* * * *

(As amended, eff. Oct. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; **Oct. 3, 1990, eff. Jan. 1, 1991.**)

Amendments to Rule 50

Rule 50 is amended as follows:

RULE 50. MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOT WITHSTANDING THE VERDICT

(a) *Motion for Directed Verdict – When Made – Effect.* * * *

(b) *Motion for Judgment Notwithstanding the Verdict.* * * *

(c) *Motion for Judgment Notwithstanding the Verdict – Conditional Rulings on Grant of Motion.*

(1) * * *

(2) * * *

(d) *Motion for Judgment Notwithstanding the Verdict – Denial of Motion.* * * *

PRACTICE COMMENT: Rule 50(b) permits a party simultaneously to move for a new trial and for judgment notwithstanding the verdict. The time for filing a motion for a new trial in the court, 30 days, is governed by 28 U.S.C. § 2646. To avoid confusion and inefficiency, Rule 50(b) provides the same 30-day filing period for any motion filed thereunder. In contrast, Rule 50(b) of the Federal Rules of Civil Procedure provides a 10-day period. However, motions for new trials in courts in which the Federal Rules of Civil Procedure apply are not subject to 28 U.S.C. § 2646.

PRACTICE COMMENT: Rule 50(c)(2) provides a 30-day period within which to move for a new trial pursuant to Rule 59. The corresponding period provided by Rule 50(c)(2) of the Federal Rules of Civil Procedure is 10 days. The lengthier period to file such a motion in the court is mandated by 28 U.S.C. § 2646.

(As amended, July 28, 1988, eff. Nov. 1, 1988; **Oct. 3,1990, eff. Jan. 1,1991.**)

Amendments to Rule 59

Rule 59 is amended as follows:

RULE 59. NEW TRIALS – REHEARINGS – AMENDMENT OF JUDGMENTS

(a) *Grounds.*

A new trial or rehearing may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury **or in an action finally determined,** for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for Motion.* * * *

(c) *Time for Serving Affidavits.* * * *

(d) *On Initiative of Court.* * * *

(e) *Motion to Alter or Amend a Judgment.* * * *

PRACTICE COMMENT: Rule 59(b) provides for a 30-day period within which to move for a new trial or rehearing. In contrast, Rule 59(b) of the Federal Rules of Civil Procedure provides for a 10-day period. The lengthier period is required by 28 U.S.C. § 2646, a statute not applicable to the district courts.

(As amended, eff. Jan. 1, 1985; **Oct. 3,1990, eff. Jan. 1,1991.**)

Addition of Rule 67.1

New Rule 67.1 reads as follows:

RULE 67.1. DEPOSIT IN COURT PURSUANT TO RULE 67

(a) *Order for Deposit – Interest Bearing Account.*

Whenever a party seeks a court order for money to be deposited by the clerk in an interest-bearing account, the party shall file, by delivery or by mailing by certified mail, return receipt requested, the proposed order with the clerk or financial deputy who will inspect the proposed order for proper form and content and compliance with this rule prior to signature by the judge for whom the order is prepared. The proposed order shall be substantially in the form set forth in Form 16 of the Appendix of Forms.

(b) *Orders Directing Investment of Funds by Clerk.*

Any order obtained by a party or parties in an action that directs the clerk to invest in an interest-bearing account or instrument funds deposited in the registry of the court pursuant to 28 U.S.C. § 2041 shall include the following:

(1) the amount to be invested;
(2) the name of the depository approved by the Treasurer of the United States as a depository in which funds may be deposited;
(3) a designation of the type of account or instrument in which the funds shall be invested;
(4) wording which directs the clerk to deduct from the income earned on the investment a fee, consistent with that authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office, equal to the first 45 days of income earned on the investment, whenever such income becomes available for deduction from the investment so held and without further order of the court.

(As added, Oct. 3,1990, eff. Jan. 1,1991.)

Amendments to Rule 71

Rule 71 is amended as follows:

RULE 71. DOCUMENTS IN AN ACTION DESCRIBED IN 28 U.S.C. § 1581(c) OR (f)

(a) *Actions Described in 28 U.S.C. § 1581(c).* * * *

(1) * * *
(2) * * *
(3) * * *

(b) *Alternative Procedure in an Action Described in 28 U.S.C. § 1581(c)*

As an alternative to the procedures prescribed in subdivision (a) of this rule in an action described in 28 U.S.C. § 1581(c):

(1) Within [~~10~~] **40** days after the date of service of the complaint upon the administering authority or the International Trade Commission, the administering authority or the Commission may file with the clerk of the court a certified list of all items described in subdivisions (a)(1) and (a)(2) of this rule, **along with a copy of the documents which the parties have designated will constitute the agency record. The administering authority or the International Trade Commission shall serve a copy of the certified list upon the plaintiff forthwith.** [~~and forthwith serve a copy of the certified list upon the plaintiff; within 10 days after the date of service of the certified list, the plaintiff shall either stipulate with the agency that the filing of the certified list alone shall constitute the record or shall designate those items contained in the certified list which it wishes to be filed with the clerk of the court. If the parties stipulate that the certified list alone shall constitute the record, the plaintiff shall forthwith file a copy of the stipulation with the clerk of the court. If the plaintiff designates those items contained in the certified list which it wishes be filed with the clerk of the court, the plaintiff shall serve such designation upon the agency within 10 days after the filing of the certified list; within 10 days after the date of service of plaintiff's designation, the agency shall file the designated items, as well as any other items from the certified list which the agency deems relevant, with the clerk of the court.~~]

(2) * * *
(3) * * *

(c) *Confidential or Privileged Information in an Action Described in 28 U.S.C. § 1581(c).*

(d) *Documents in an Action Described in 28 U.S.C. § 1581(f).* * * *

(e) *Documents filed – Copies.* * * *

(f) *Filing of the Record with the Clerk of the Court – What Constitutes.* * * *

PRACTICE COMMENT: * * *

(As amended, July 28, 1988, eff. Nov. 1, 1988; **Oct. 3,1990, eff. Jan. 1,1991.**)

Amendments to Rule 89

Rule 89 is amended as follows:

RULE 89. EFFECTIVE DATE

(a) *Effective Date of Original Rules.* * * *
(b) *Effective Date of Amendments.* * * *
(c) *Effective Date of Amendment.* * * *
(d) *Effective Date of Amendments.* * * *
(e) *Effective Date of Amendments.* * * *
(f) *Effective Date of Amendments.* * * *
(g) *Effective Date of Amendments.* * * *

(h) *Effective Date of Amendments.* * * *

(i) *Effective Date of Amendments.* * * *

(j) *Effective Date of Amendments.*

The amendments adopted by the court on October 3, 1990, shall take effect on January 1, 1991. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(As added, eff. Jan. 1, 1985; as amended, June 19, 1985, eff. Oct. 1,1985; July 21, 1986, eff. Oct. 1, 1986; Dec. 3, 1986, eff. Mar. 1, 1987; Apr. 28, 1987, eff. June 1, 1987; July 28, 1988, eff. Nov. 1, 1988; **Oct. 3,1990, eff. Jan. 1,1991.**)

Amendments to Form 9

Form 9 is amended as follows:

UNITED STATES COURT OF INTERNATIONAL TRADE

FORM 9

_____, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. _____

STIPULATED JUDGMENT ON AGREED STATEMENT OF FACTS

_____ attorney for plaintiff. _____ Assistant Attorney General, for defendant.

This action, as prescribed by Rule 58.1 of the Rules of the United States Court of International Trade, has been stipulated for judgement on agreed statement of facts, in which the parties agree that the merchandise marked "A" and initialed _____ by Import Specialist _____ is properly dutiable upon the basis of _____ value as defined in section 402 _____ of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 _____, and that said value is _____.

The parties further agree that the merchandise marked "B" and initialed _____ by Import Specialist _____ which is {the same} {similar} in all material respects as the merchandise in _____ *v.* _____ [give complete case citation] which record has been incorporated herein, is properly dutiable as _____, under _____ as modified by _____, at the rate of _____.

All other claims are withdrawn.

It is hereby ORDERED that the {district director of customs} {regional commissioner} at the port _____ shall reliquidate the entry accordingly.

BY ORDER OF THE COURT

_____
JUDGE

Dated: _____

UNITED STATES COURT OF INTERNATIONAL TRADE

FORM 9

**_____, PLAINTIFF[s], *v.*
THE UNITED STATES, DEFENDANT.**

COURT NO[S]., [etc. [1]]

See attached Schedule[s] [2]

Before: (Insert name of Judge if assigned)

Port[s]: [(List applicable port[s] of entry] [3]

STIPULATED JUDGMENT ON AGREED STATEMENT OF FACTS

[This action] [These actions], as prescribed by Rule 58.1 of the Rules of the United States Court of International Trade, [is] [are] stipulated for judgment on the following agreed statement of facts in which the parties agree that:

1. The protest[s] involved here [was] [were] filed and the action[s] involved here[was] [were] commenced within the time provided by law, and all liquidated duties, charges or exactions have been paid prior to the filing of the summons(es).

2. The imported merchandise covered by the [entry] [entries] set forth on Schedule ["A"] ["B"], [4] attached, consists of [(Describe imported merchandise. The description should be sufficiently specific to enable the Customs Service to identify the stipulable articles. Appropriate general terms or inclusion of descriptions on Schedule may be used.)]

3. The imported merchandise was classified by the Customs Service as [(describe)] under [(insert pertinent tariff provision[s])] at the rate[s] of [(insert tariff rate[s])] [, depending upon the date of entry].[5]

4. The stipulable imported merchandise is classifiable as [(describe)] under [(insert pertinent tariff provision[s]) at the rate[s] of [(insert tariff rate[s])) [, depending upon the date of entry].[6]

5. The imported merchandise, covered by the entries set forth on the attached schedule, which have been marked with the letter[s] [("A")] [and] [("B")][7] and initialed ____ [8] by _____ [9], of the Customs Service, [10] is stipulable in accordance with this agreement.

6. Any refunds payable by reason of this judgment are to be paid with any interest provided for by law.

7. All other claims and non-stipulable entries[11] are abandoned.

**Court No[s]. [(insert lead number [etc.])].
See attached Schedule[s]**

Respectfully submitted,

By: _____

**Attorney[s] for Plaintiff[s]
[(Insert name of firm, address & telephone number)]
Assistant Attorney General
Civil Division**

By: _____

**[(Insert name of Attorney in Charge)]
Attorney in Charge
International Trade Field Office**

[(Insert name of applicable DOJ attorney)] [12]

Dept. of Justice, Civil Division
Commercial Litigation Branch
26 Federal Plaza
New York, New York 10278
Tel.: (212) 264-9230
Attorneys for the United States

IT IS HEREBY ORDERED that [this action] [these actions] [is] [are] decided and this final judgment is to be entered by the Clerk of this Court; the appropriate Customs Service officials shall [reliquidate the] [entry] [entries] [and][13] make refund in accordance with the stipulation of the parties set forth above.

Judge [insert name]

Dated: _____

SCHEDULE [A] [B] TO STIPULATED JUDGMENT[14]

***Port*: [insert port of entry)]**

File or Assignment	Court #	Protest #	Entry #	Description of Merchandise[15]

(Date Summons Filed)[16]

ENDNOTES

Endnotes are for guidance in preparation of document and are not part of the final document. Material in brackets should be selected and/or modified depending on whether singular or plural text, et cetera, is applicable, and inserted into the text of the document; the brackets themselves are ordinarily not part of the final document.

1. If more than one case.

2. The Schedule should contain, the court number[s], the date[s] of the filing of the summons[es], the protest number[s] and the entry number[s]. The civil actions should be arranged in ascending order, and the name of the Judge assigned, and/or reserve or suspension file in which the case resides, should be set forth.

3. If more than one port of entry is covered by a single stipulated judgment ("stipulation") covering a civil action, separate pages of the schedule (see n. 2) should be used for listing each different port and its applicable entries and protests. Civil actions involving different ports of entry should not normally be combined on a single stipulation, since the need to consider the entries at the ports involved will usually delay the stipulation until all ports respond; in such instances, it is preferable that separate stipulations be prepared.

4. See n. 3.

5. If appropriate, as an addition or an alternative:

> **3. The imported merchandise was appraised by the Customs Service upon the basis of [(describe and insert statutory provision[s])] at a value of [(describe)].**

6. If appropriate, as an addition or an alternative:

> **4. Plaintiff claims that the imported merchandise should be appraised upon the basis of [(describe and insert statutory provision[s]) at a value of * * * (describe)].**

7. Different letters should be used if the entries were previously marked on a different stipulation with the letter "A" or if the stipulation covers merchandise stipulated under more than one tariff provision and/or at different appraised values. More than one letter is required to distinguish merchandise stipulable under different provisions or at different appraised values.

8. Initials to be inserted by the Government.

9. See n. 8. Name of person to be inserted by the Government.

10. If appropriate insert:

> **is the same [similar] in all material respects as the merchandise in [(insert complete case citation)] and,**

11. In the event the civil action[s] covered by the stipulation include[s] nonstipulable entries (*e.g.*, no stipulable merchandise, untimely entries, increased duties not timely paid), such entries should be clearly marked with an asterisk [*] on each page on which they appear, including schedules, with the footnote: "* All claims arising from this entry are abandoned."

12. To be completed by either plaintiff's or defendant's counsel.

13. In most instances the parties will prefer that the refund be effectuated by having the entry(ies) reliquidated; in other instances the parties may agree that a refund should be made without the necessity of reliquidation.

14. See nn. 2 and 3.

15. [(See paragraph 2 of stipulated judgment and include if necessary. Otherwise omit.)]

16. To be inserted below each separate court number.

(As amended, eff. Jan 1, 1982 **Oct. 3,1990, eff. Jan. 1,1991.**)

Addition of Form 16

New Form 16 reads as follows:

UNITED STATES COURT OF INTERNATIONAL TRADE

FORM 16

_____, PLAINTIFF, *v.*
_____, DEFENDANT

Court No. _____

Before: _____

ORDER OF DEPOSIT AND INVESTMENT

On this day came to be heard plaintiff's request to deposit funds in the registry of the United States Court of International Trade and the investment of said sums in a [name of account or instrument] at [name of the bank] and the court decided to grant the same; it is therefore,

ORDERED that the clerk accept and deposit into the registry of the court the deposit made by defendant in this cause of $[amount]; it is further

ORDERED that the clerk promptly and properly invest said monies as stipulated and pursuant to Rule 67.1 of the Rules of the United States Court of International Trade and deduct the registry fee as stated therein from the income earned over the first 45 days such sums remain so deposited and invested in the court's registry.

DONE at New York, New York this [date].

_____
Judge [name]

Approved:

_____
Attorney for Defendant [Plaintiff]
[Address]
[Telephone number]

Verified by:

_____
Clerk of the Court
United States Court of International Trade

(As added, Oct. 3, 1990, eff. Jan. 1, 1991.)

Index

Customs Bulletin and Decisions
Vol. 24, No. 47, November 21, 1990

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Rules of the U.S. Court of International Trade

U.S. G.P.O. 1990–261–994:20008